SHAWN A. MANGANO, ESQ.
Nevada Bar No. 6730
shawn@manganolaw.com
SHAWN A. MANGANO, LTD.
9960 West Cheyenne Avenue, Suite 170
Las Vegas, Nevada 89129-7701
Tel: (702) 683-4788
Fax: (702) 922-3851

J. CHARLES COONS, ESQ.
Nevada Bar No. 10553
ccoons@righthaven.com
Assistant General Counsel at Righthaven LLC
JOSEPH C. CHU, ESQ.
Nevada Bar No. 11082
jchu@righthaven.com
Staff Attorney at Righthaven LLC
Righthaven LLC
9960 West Cheyenne Avenue, Suite 210
Las Vegas, Nevada 89129-7701
(702) 527-5900

Attorneys for Plaintiff Righthaven LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited-liability company, Plaintiff, v. CENTER FOR INTERCULTURAL ORGANIZING, a not-for-profit Oregon entity; and KAYSE JAMA, an individual, Defendants.	Case No.: 2:10-cv-01322-JCM-LRL **PLAINTIFF'S REPONSE TO ORDER TO SHOW CAUSE AND, ALTERNATIVELY, REQUEST FOR A CONITNUANCE TO CONDUCT DISCOVERY PURSUANT TO FRCP 56(f)**

Plaintiff Righthaven LLC ("Righthaven") hereby submits this Response to the Order to Show Cause and Request to Conduct Discovery Pursuant to FRCP 56(f) (the "Response") as to why Righthaven's copyright infringement claims against Defendants Center for Intercultural

Organizing ("CIO") and Kayse Jama ("Mr. Jama"; collectively with CIO known herein as the "Defendants") should not be dismissed under the 107 U.S.C. § 107 Fair Use exception. Righthaven's Response is supported by the accompanying declaration of Shawn A. Mangano, Esq. (the "Mangano Decl."), and is based on the pleadings and papers on file in this action, any oral argument allowed by this Court, and on any other matter of which this Court takes notice.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Righthaven welcomes the opportunity to address the Court's apparent concern that the copyright infringement claims asserted against Defendants may be precluded by a fair use defense. Let there be no mistake, when the Court undertakes the fair use analysis required by several decisions by the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"), along with decisional law from the Supreme Court of the United States (the "Supreme Court"), it will clearly understand the viability of the copyright infringement claims before it.

Simply put, Righthaven's infringement claims involve the 100% copying and unauthorized use by Defendants of a copyright protected original work of authorship by Lynnette Curtis entitled "Misdemeanor violations leading to deportations" (the "Work"). (Compl. Ex. 1, Doc. #1, 1-1 at 2-4.) Specifically, the Work reflects over 30 paragraphs of research and writing by Ms. Curtis. (*See id.*) Defendants, without any creative, intellectual effort or critical contributions on their part, used 100% of the results of Ms. Curtis' efforts their own social and economic purposes without making any effort to obtain consent or authorization for doing so. (Compl. Ex. 2, Doc. #1-1 at 6-7.) While not as shocking to the conscious as the theft of a precious family heirloom, Righthaven asserts that Defendants' infringing conduct amounts to the theft of an equally valuable item – the copyright protected creative literary efforts of an author, which should not be excused by a finding of fair use.

As Righthaven will explain with citations to controlling Ninth Circuit precedent, the statutory Fair Use exception codified under 107 U.S.C. § 107 does not excuse the Defendants' 100% unauthorized replication of the Work. Likewise, CIO's status as a federally recognized non-profit organization does not relieve Defendants of liability under the Fair Use exception for their unauthorized copying, and use, of 100% of the Work. CIO's apparent donation-based business model also does not permit Defendants to misappropriate the entirety of another's literary work for display on their website under the auspices of fair use – rather such use supports a finding against fair use. While Righthaven is understandably sensitive to the possible concern that its copyright infringement claim has unfairly targeted a non-profit entity which is engaged in admirable civic and interest group endeavors, this is simply not the case. For profit or not-for-profit entities are not permitted to steal the entirety of another's copyright protected material for their own use without contributing even a shred of original content or critical criticism and have such conduct sanctioned under the statutory rubric of fair use. As the Ninth Circuit has explained:

> *The fair use doctrine is not a license for corporate theft*, empowering a court to ignore a copyright whenever it determines the underlying work contains materials of possible public importance.

Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1115-16 (9th Cir. 2000) ("*Worldwide Church*")(emphasis added).

From the standpoint of applying the statutory factors governing the Court's analysis, Righthaven is confident that Defendants' 100% unauthorized replication and use of the Work cannot qualify for fair use protection. As demonstrated below, Righthaven asserts the following with regard to the statutory fair use factors in view of Defendants' conduct:

- The purpose and character of use (17 U.S.C. § 107(1)) does not support a finding of fair use because Defendants failed to contribute even a scintilla of content to or otherwise transform the Work for any purpose with meaningful commentary or criticism. Rather, Defendants merely engaged in the cyberspace equivalent of making a Xerox copy of the Work and used it on virtual signage for its organization without any contribution on their part aside from their proverbial photocopying efforts.

- The nature of the Work (17 U.S.C. § 107(2)) does not support a finding of fair use because it clearly represents Ms. Curtis' creative literary endeavors and, despite possessing factual content, is copyright protected and which Defendants have taken the entirety of without authorization.
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole (17 U.S.C. § 107(3)) does not support a finding of fair use because Defendants copied and used, without any associated comments or critical analysis, 100% of the Work at-issue.
- Defendants' infringing conduct has also detrimentally effected the use and potential market for or the value of the Work ((17 U.S.C. § 107(4)) because they have replicated 100% of the copyrighted content, which results in an economic benefit for CIO and which detrimentally impacts the original holder of the material.

Succinctly stated, the Fair Use exception simply does not apply to this case in view of the facts before the Court and in view of controlling Ninth Circuit and other cited precedent. In fact, Righthaven maintains that the only appropriate result from the Court's analysis should be a finding, as a matter of law, that Defendants are not entitled to claim fair use.

Procedurally, Righthaven maintains that the Court cannot dismiss the Complaint in view of the record before it. To the extent the Order to Show Cause ("OSC") is predicated on the Court's *sua sponte* authority to determine the merits of the copyright infringement claims before it under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), Righthaven's claims simply cannot be properly dismissed under a fair use analysis in view of the applicable standard. Assuming, *arguendo*, the Court is still inclined to take this drastic step, it must provide Righthaven with leave to amend to potentially correct any defective allegations in view of a dismissal order.

To the extent the OSC is predicated on the Court's *sua sponte* authority to dispose of claims before it pursuant to Federal Rule of Civil Procedure 56 ("Rule 56"), Righthaven's claims are unquestionably not amenable to adjudication given the materials before the Court and given that absolutely no discovery has been conducted. To the extent the Court finds against

Righthaven under a Rule 56 analysis, Righthaven respectfully requests an opportunity to conduct discovery pursuant to Rule 56(f).

In sum, Righthaven asserts, as argued below, that the only result which is ripe for adjudication given the record presented and in view of the controlling case law is a determination, as a matter of law, that Defendants are not entitled to claim fair use. Righthaven respectfully encourages the Court to enter such a finding after performing a fair use analysis in view of the record before it.

II. FACTS

Righthaven filed this copyright infringement action against the Defendants on August 5, 2010. (Compl. ¶¶ 1, 27-39, Doc. #1 ¶¶ 1, 27-39.) As set forth below, the Court must accept these allegations as true for purposes of determining the viability of Righthaven's claims in view of the Fair Use exception under Rule 12(b)(6). Moreover, as set forth below, the Court must draw all reasonable inferences from the record in Righthaven's favor under Rule 56 in deciding the merits of a fair use defense in this case. Righthaven asserts that its claims survive scrutiny under either of these procedural standards. In fact, if any dismissal or adjudication is warranted following the Court's review, it should be a finding that Defendants cannot, as a matter of law, rely on a fair use defense.

Righthaven has asserted ownership of the infringed Work and has submitted evidence of registration of the Work with the United States Copyright Office. (*Id*. ¶ 8, ¶ 23, Ex. 3; Doc. # 1 ¶ 8, ¶ 23, #1-1 at 9.) Righthaven contends that on or about July 8, 2010, the Defendants copied and posted a 100% copy of the Work on their publicly available Internet domain located at <interculturalorganizing.org> (the "Website"). (Compl. ¶¶ 5-6, 11, Ex. 2; Doc. #1 ¶¶ 5-6, 11, #1-1 at 6-7.) This Response is filed based on the Court's November 15, 2010 issuance of the OSC, which requested Righthaven address why its copyright infringement claims should not be dismissed under the Fair Use exception. (Doc. #12.)

III. STANDARDS GOVERNING THE COURT'S ANALYSIS

A. Procedural Standards Applicable to the OSC

Righthaven is unclear as to the procedural basis upon which the Court has issued the OSC, but it understands from the contents of the OSC that the Court has requested briefing and a hearing concerning potential dismissal of the copyright infringement claims before it based the Fair Use exception. (Doc. #12.) Righthaven maintains the Court is only vested with *sua sponte* dismissal authority under Rule 12(b)(6) or Rule 56.

Assuming the Court is exercising *sua sponte* dismissal authority pursuant to Rule 12(b)(6), such action is only "appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint." *See Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962, 966 (C.D. Cal. 2007). All allegations asserted in the complaint must be construed in favor of the non-moving party and all material allegations – including any reasonable inferences drawn from same – must be accepted as true by the Court under a Rule 12(b)(6) analysis. *See id.* Where dismissal is granted, leave to amend should be granted unless doing so is futile. *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 991 (9th Cir. 1999).

In the event the Court is exercising *sua sponte* dismissal authority pursuant to Rule 56, different standards apply. District courts "possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). In such circumstances, the case must have been provided with a sufficient opportunity to appreciate the discovery topics at-issue and to conduct discovery on such topics. *Portsmouth Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985). Granting summary judgment requires the absence of any genuine issue of material fact, thus entitling a party to entry of judgment as a matter of law. FED. R. CIV. P. 56 (c). Adjudication may be delayed in order to provide a party potentially facing an adverse decision to conduct discovery and present the court with additional evidence. FED. R. CIV. P. 56 (f). With regard to fair use, the Court may only conduct an analysis where, as a matter of law, the circumstances present dispositive presumed or admitted facts. *See Fisher v. Dees*, 794 F.2d 432, 435-36 (9th Cir. 1986); *accord Burnett.*, 491 F.Supp.2d at 967.

Application of the foregoing standards in view of the record before the Court demonstrates that dismissal is unwarranted based on the Fair Use exception. In fact, Righthaven maintains the record supports a determination that the Fair Use exception does not apply, as a matter of law, to the copyright infringement claims before the Court.

B. ***Standards Applicable to the Court's Fair Use Analysis***

Substantively, when a copyright defendant asserts the affirmative defense of fair use, the district court must consider the following factors: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (internal quotation marks omitted); *see also* 17 U.S.C. § 107. The fair use doctrine requires a "case-by-case analysis." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Courts are required to consider and weigh all four factors when conducting a fair use analysis. *Id.* Conducting such an analysis as a matter of law requires that controlling facts be presumed or admitted. *See Fisher*, 794 F.2d at 435-36; *accord Burnett.*, 491 F.Supp.2d at 967.

Righthaven asserts that Defendants' unauthorized 100% copying and use of the Work in view of the above standards precludes dismissal of its copyright infringement claims. Such a result would run contrary to controlling Ninth Circuit precedent. In fact, entry of a finding that Defendants' cannot, as a matter of law, rely on a fair use defense is compelled upon proper application of the Ninth Circuit precedent and the other authorities cited below.

IV. ARGUMENT

In undertaking a fair use analysis, one fundamental and transcendent fact is crystal clear – that Defendants blatantly copied and used 100% of the Work without authorization. As emphasized by the Ninth Circuit in *Worldwide Church*, *supra*, which rejected, as a matter of law, a non-profit organization's fair use defense for the 100% unauthorized replication and use of an author's copyrighted work:

> We have found no published case holding that fair use protected the verbatim copying, without criticism, of a written work in its entirety.

Worldwide Church, 27 F.3d 1110, 1120.

This case is no different than *Worldwide Church*. This Court, as the Ninth Circuit panel did in *Worldwide Church*, must engage in the four factor fair use analysis set forth under 107 U.S.C. § 107 in view of Defendants' unauthorized taking and use of 100% of the Work at-issue. When this analysis is correctly performed, the outcome should be the same as that in *Worldwide Church* – a finding, as a matter of law, against fair use by the Defendants.

A. ***The Worldwide Church Decision's Controlling Impact on This Court's Fair Use Analysis***

The Ninth Circuit panel's decision in *Worldwide Church*, which resulted in a finding, as a matter of law, against fair use by a non-profit religious entity with regard to its unauthorized, wholesale copying and use of a literary work, controls this Court's analysis. As explained herein, the similarities between the defendants' conduct in *Worldwide Church* and those of the Defendants in this case compel a finding, as a matter of law, against fair use. Dismissal of Righthaven's infringement claims in view of *Worldwide Church*, as well as in view of the other cases cited herein, would be a shocking result that would almost certainly face reversal on review by the Ninth Circuit.

In *Worldwide Church*, the parties were two non-profit religious organizations – Worldwide Church of God ("WCG") and Philadelphia Church of God, Inc. ("PCG"). *Worldwide Church*, 227 F.3d at 1112. A prominent WCG pastor had written a copyrighted work entitled "Mystery of the Ages" ("MOA"). *Id.* WCG used MOA in promoting its non-profit ministry for many years but at some point stopped doing so two years after the author-pastor's death. *Id.* at 1113. Some years later, two former WCG ministers founded PCG. *Id.* As part of PCG's new ministry, it began copying and distributing MOA "verbatim, deleting only MCG from the copyright page . . ." without requesting permission from WCG. *Worldwide Church,* 227 F.3d at 1113. WCG sued PCG for copyright infringement based on its wholesale, unauthorized copying of MOA. *Id.* at 1113-14. The district court granted summary judgment in favor of PCG by finding that PCG's alleged infringement qualified as fair use. *Id.* at 1114.

On review, the Ninth Circuit reversed the district court's decision and found, as a matter of law, PCG was "not entitled to claim fair use." for the unauthorized 100% copying of MOA. *Id.* at 1121. Moreover, the Ninth Circuit panel directed the district court to enter a permanent injunction in WCG's favor and to conduct a trial on damages "[b]ecause infringement by PCG of WCG's copyright is undisputed, barring fair use . . . ." *Id.*

In its decision, the Ninth Circuit panel rejected a number of arguments which will likely be echoed by the Defendants in this case. First, the panel rejected PCG's contention that its copying of the MOA qualified as fair use because it was for "non-profit religious and educational purposes." *Id.* at 1114. The panel reasoned "'[t]he crux of the profit/nonprofit distinction [under a fair use analysis] is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.'" *Id.* at 1117 (*quoting Haper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S.539, 562 (1985)). In this regard, PCG, despite its non-profit status, was found to have "unquestionably" profited by providing the MOA at no cost to its members and through the use of same to potentially generate new memberships. *Id.* at 1118. Moreover, by virtue of the relief entered, which included directions to the district court to enter a permanent injunction and to proceed to a trial on damages, the *Worldwide Church* panel found a non-profit liable for copyright infringement. *Id.* at 1121. This stunning result on appeal from a record upon which the district court granted summary judgment in favor PCG on fair use grounds only serves to reinforce that non-profit entities cannot escape liability for copyright infringement based on their non-profit status or their altruistic institutional goals and purposes. Accordingly, the Ninth Circuit panel's decision in *Worldwide Church* first stands for the proposition, as applied to this case, that

Defendants' cannot escape copyright infringement liability because the unauthorized display was made on a non-profit entity's website.

The *Worldwide Church* decision also controls this Court's fair use analysis because it involved the 100% duplication and unauthorized use of a literary work. *See Worldwide Church,* 227 F.3d at 1113. The 100% duplication at-issue in *Worldwide Church* transcended the Ninth Circuit panel's four factor analysis and unquestionably resulted in a finding, as a mater of law, against fair use. With regard to the purpose and character of the use, which is the first factor under a fair use analysis, the panel found that PCG's wholesale replication of the MOA weighed against fair use because "PCG's copying of WCG's MOA in its entirety bespeaks of no 'intellectual labor and judgment.'" *Worldwide Church,* 227 F.3d at 1117. The panel additionally observed, with regard to the "amount and substantiality" third fair use factor, "[w]hile 'wholesale copying does not preclude fair use per se,' copying an entire work 'militates against a finding of fair use.'" *Id.* (*quoting Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986)). The panel then explained that "'the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression.'" *Id.* at 1118 (*quoting Harper & Row Publishers, Inc.*, 471 U.S. at 565)). In all practicality, the Ninth Circuit's decision in *Worldwide Church* virtually established a presumption against a finding of fair use in cases of unauthorized, wholesale copying of a protected work. The Court should proceed with its analysis in this case with an appropriate degree of skepticism toward a finding of fair use given Defendants' 100% unauthorized duplication of the Work.

In short, the Court's fair use analysis should be guided by the rationale and findings of the Ninth Circuit panel's decision in *Worldwide Church,* with the enhancement of the additional authorities cited herein. Doing so will provide the Court with clear guidance as to the applicability of a fair use defense where the entirety of a work is copied without permission by a non-profit entity. When this guidance is followed, Righthaven trusts the Court will properly find, as a matter of law, that Defendants are not entitled to claim fair use as a defense to their infringing conduct.

B. *Proper Application of the Four Factor Analysis Should Result in a Finding That Defendants Are Not Entitled to Claim Fair Use as a Defense to Their Unauthorized 100% Duplication of the Work*

As discussed above, the Court is required to undertake a four factor analysis to determine whether Defendants' are entitled to shelter themselves from copyright infringement liability based on the Fair Use exception. Righthaven asserts that Defendants are not entitled to a fair use defense, as a matter of law, when this four factor analysis is properly undertaken – particularly given the verbatim replication of the Work at-issue in this case.

1. *The Purpose and Character of Use Factor Weighs Strongly in Righthaven's Favor Given Defendants' Unauthorized 100% Copying of the Work*

The first factor in the fair use analysis calls for consideration of "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). This factor weighs heavily in Righthaven's favor in view of Defendants' unauthorized 100% replication and use of the Work on CIO's Website.

In considering the purpose and character of the use, courts must determine whether the alleged infringing publication, when comparatively viewed with the copyrighted work, "merely replaces the object of the original creation or instead adds a further purpose or different character." *Napster, Inc.*, 239 F.3d at 1015. Stated differently, the "purpose and the character of use" factor involves resolving the question as to "whether the allegedly fair use was 'transformative,' *i.e.*, whether the second use 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'" *Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938 (9th Cir. 2002) (*quoting Campbell*, 510 U.S. at 579). This inquiry has a wide-ranging impact on the fair use analysis: "the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, 510 U.S. at 579. The inverse of this principle must also be true: the less transformative the infringing work, the other factors that may support a finding of fair use will less significant.

Here, the Court is presented with a case of the unauthorized 100% replication and use of the Work by Defendants, of which CIO is a non-profit entity. As discussed above, the Ninth Circuit's decision in *Worldwide Church* establishes that an entity cannot escape copyright infringement liability merely based on its not-for-profit status. *Worldwide Church*, 227 F.3d at 1118. Moreover, with regard to the first prong of the fair use analysis, the *Worldwide Church* panel reasoned that copying a literary work "in its entirety bespeaks no 'intellectual labor and judgment.' It merely 'supersedes the object' of the original work." *Id.* at 1117. Furthermore, while the infringing party in *Worldwide Church* was of non-profit status, *the entity still used the wholesale duplicated work for "profit" by deriving a benefit in terms of delivering free content to its members and by potentially increasing its membership in making such content available to others.* *Id.* at 1118. In short, the *Worldwide Church* panel found that the act of wholesale copying a protected work demonstrated absolutely no transformative efforts by the infringing party, despite being a non-profit entity, and its use in connection with its business operations compelled a finding that the first factor weighed against fair use. *Id.* at 1117-18.

The decision in *Worldwide Church* does not stand alone. Other courts faced with the issue of wholesale or verbatim copying have likewise concluded that such infringing conduct weighs against a finding of fair use. *See Campbell*, 510 U.S. at 587-88 (whether "a substantial portion of the infringing work was copied verbatim from the copyrighted work is a relevant question . . . for it may reveal a dearth of transformative character or purpose under the first factor . . ."); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978) (acknowledging that "near-verbatim copying" generally precludes a finding of fair use); *Los Angeles Time v. Free Republic*, No. 98-7840, 1999 WL 33644483, at *10 (C.D. Cal. Nov. 8, 1999) ("There is nothing transformative about copying the entirety or portions of a work verbatim.") ("*Free Republic I*").

The claimed infringement presented to this Court falls squarely within the analysis undertaken in and findings made in *Worldwide Church* and which is additionally supported by the above cited authorities. The infringement at-issue in this case contains an exact, 100%, duplication of the Work. (Compl. Ex. 1, Doc. #1, 1-1 at 2-4, Ex. 2, Doc. #1-1 at 6-7.) No modifications or revisions are contained in the infringing copy of the Work displayed on CIO's Website. (Compl. Ex. 2, Doc. #1-1 at 6-7.) In fact, the infringing copy of the work is nothing more than a cut-and-paste reprint of the Work. (Compl. Ex. 2, Doc. #1-1 at 6-7.) This form of mindless infringing conduct clearly contains absolutely no "transformative value" under the first fair use factor. As the *Worldwide Church* panel reasoned, to satisfy this requirement, "[t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and *not merely the facile use of the scissors, or extracts of the essential parts, constituting the chief value of the original work.*" *Worldwide Church,* 227 F.3d at 1117 (emphasis added). Ultimately, it appears that the Defendants' infringing conduct – a wholesale, verbatim, unmodified reproduction of the original Work – is precisely the nature of infringement for which the transformative value requirement was devised. These circumstances weigh heavily against a finding of fair use under the first analysis factor.

Furthermore, the Defendants' unauthorized display of the Work unquestionably constitutes a commercial use – not a sanctioned non-profit educational one – under the first fair use factor. While the Defendants maintain that "CIO's purpose is to educate and assist immigrants and refugees who have recently relocated to the United States …" (Def.'s Reply to Mot. to Dismiss at 2:21, Doc. #10), the evidence plainly suggests that Defendants either received, or attempted to receive, a financial gain through ownership and operation of the Website. A cursory review of the Website clearly depicts numerous donation banners and membership options, in which Internet visitors to the website have the opportunity to join CIO and pay required dues or to simply donate directly to CIO. (Mangano Decl. ¶ 3, Ex. 1.) Thus, as Internet users viewing the unauthorized, verbatim copy of the Work were exposed to requests for donations to or invitations to become members of CIO, along with viewing other advertising content, there can be no dispute that the Defendants' unauthorized display of the Work was motivated, at least in part, by commercial gain.

In addition to advancing the Defendants' efforts to generate donations to CIO and to increase ad revenues by attracting users to the Website, the act of publicly displaying the Work may have also helped generate good will for the Website and for CIO. While the evidence clearly suggests that the unauthorized wholesale duplication of the Work likely contributed to the Defendants' financial benefit, the Ninth Circuit has nevertheless held that a "[d]irect economic benefit is not required to demonstrate a commercial use." *See Napster, Inc.*, 239 F.3d at 1015. In other words, in the context of fair use, "monetary gain is not the sole criterion . . ." *Worldwide Church*, 227 F.3d at 1117. Instead, the threshold for commercial use can be satisfied if the defendant's use of the infringed work generates good will for, and promotes, the defendant's underlying operation. *See Free Republic I*, 1999 WL 33644483, at *15-16 (finding of fair use is supported by "the fact that defendants' web page is enhanced by use of the articles, and that [sic] fact that the copying assists in generating support, both financial and non-financial, for their operation"). This concept is directly applicable at present. Logic dictates that the Defendants' display of immigration and deportation-related information, such as the unauthorized, wholesale replication and display of the Work on the Website directly enhances the Website's purpose, helps generate interest in CIO's purpose, potentially leads to new members/viewers for CIO, and likely results in increased donations to CIO as is invited through its banners on its Website. Accordingly, the Defendants' unauthorized, wholesale copying and display of the Work should be seen as being intended not only to increase potential revenues, but also to advance the Website's underlying function, thereby increasing its good will. Under Ninth Circuit precedent, such circumstances constitute commercial use under the first fair use analysis prong – even despite CIO's non-profit status. *See Worldwide Church*, 227 F.3d at 1118.

In sum, the Defendants' unauthorized 100% copying of the Work was entirely devoid of any transformative value. *See id.* at 1117. Moreover, Defendants' conduct employed verbatim use of the Work on its Website, which constitutes a commercial use. *See id.* at 1117-18.

Accordingly, Righthaven asserts that, in view of the foregoing, the first factor in the Court's analysis weighs heavily against a finding of fair use.

2. *The Work Entails Originality and Creative Expression, Thereby Weighing Against a Finding of Fair Use as to the Second Analysis Factor.*

The second factor in the fair use analysis calls for consideration of "the nature of the copyrighted work." 17 U.S.C. § 107(2). This factor "turns on whether the work is informational or creative." *Worldwide Church*, 227 F.3d at 1118. Righthaven asserts that this factor weighs strongly against a finding of fair use because the Work encompasses extensive originality and creative expression in over 30 paragraphs of authorship which was copied in its entirety by Defendants without authorization.

As a news article, the Work is admittedly based on fact. However, the manner in which the Work's content is structured and articulated demonstrates considerable creativity and effort undertaken by the author in bringing the material to print. Furthermore, regardless of the Work's arguably factual nature, the Defendants' copying of the Work is not somehow exempted from liability, particularly in light of the verbatim, wholesale nature of their infringing conduct.

The Defendants are not permitted to commit blatant copyright infringement simply because the Work's highly expressive attributes are coupled with substantial factual content. The "[c]reation of a nonfiction work, even a compilation of pure fact, entails originality." *Harper & Row Publishers, Inc.*, 471 U.S. at 547. Moreover, written news articles reflect the reporter's creative endeavors in compiling a piece for dissemination. *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 1467 (C.D. Cal. Apr. 4, 2000) ("*Free Republic II*"). As noted by the court in *Free Republic II*, "a news reporter must determine which facts are significant and recount them in an interesting and appealing manner." *Id.*

The Work in this case, by Lynnette Curtis, concerns the Las Vegas Metropolitan Police force's interaction with the federal immigration authorities. (Compl. Ex. 1, Doc. #1, 1-1 at 2-4.) The Work reflects a distillation of facts derived from interviews and other sources, which were then presented by Ms. Curtis in a manner deigned to effectively report on the subject matter while doing so in a fashion designed to capture and keep the reader's interest. (Compl. Ex. 1, Doc. #1, 1-1 at 2-4.) Thus, while the Work undoubtedly contains considerable factual content, the creative, expressive elements associated with Ms. Curtis' authorship of the Work cannot be ignored by the Court when undertaking its analysis under the second fair use factor. In fact, Ms. Curtis' original efforts weigh against a finding of fair use under the second factor.

The Defendants' act of copying the Work in its entirety also weighs against a finding of fair use under the second factor. The Ninth Circuit has previously found that a copyright defendant's reliance on the second fair use factor may be diminished if the defendant made a verbatim copy of the protected work in its entirety. *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors,* 786 F.2d 1400, 1409 (9th Cir. 1986); *see also Marcus v. Rowley,* 695 F.2d 1171, 1177 (9th Cir. 1983) ("Even if it were true that plaintiff's book contained only facts, this argument fails because defendant engaged in virtually verbatim copying."). Thus, even assuming, *arguendo*, that the Court classifies the Work as primarily fact-based, the verbatim nature of the Defendants' wholesale, infringing conduct further supports a finding against fair use. Accordingly, Righthaven asserts that the second factor weighs strongly against a finding of fair use.

3. *Defendants' 100% Replication of the Work Unquestionably Weighs Against a Finding of Fair Use Under the Third Analysis Factor.*

The third factor examined under a fair use analysis requires the Court to consider "the amount and substantiality of the portion used in related to the copyrighted work as a whole." *See* 17 U.S.C. § 107(2). Without question, this factor weighs against a finding of fair use given Defendants' unauthorized copying of 100% of the Work for their own use.

As recognized by the Ninth Circuit, the copying of an entire work militates against a finding of fair use. *See Worldwide Church*, 227 F.3d at 1118; *accord Hustler Magazine, Inc.*, 796 F.2d at 1155. As stated by the panel in *Worldwide Church*, "[w]e have found no published case holding that fair use protected the verbatim copying, without criticism, of a written work in its entirety." *Worldwide Church*, 227 F.3d at 1120. The panel additionally noted that "'the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression.'" *Id.* at 1118 (*quoting Harper & Row Publishers, Inc.*, 471 U.S. at 565)).

Here, the Defendants copied a written work in its entirety without any criticism, comment or other contribution. When viewing the "substantiality of the portion in relation to the copyrighted work as a whole" the answer is crystal clear – 100% of the unauthorized copy was taken from the copyrighted Work. No other result is possible. Accordingly, the third factor in the Court's fair use analysis unquestionably weighs against a finding of fair use.

4. Defendants' Unauthorized and Verbatim Copying of the Work Materially Impairs the Value of, and Potential Market for, the Work.

The fourth factor examined under a fair use analysis requires the Court to consider "the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). As the owner of the copyrighted Work, Righthaven is entitled to a presumption of market harm in light of the commercial elements associated with the Defendants' infringment. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)("*Sony Corp.*"). Notwithstanding this presumption, Defendants' wholesale, verbatim copying of the Work without authorization materially impairs the value and market for the Work. Accordingly, this fourth factor weighs against a finding of fair use.

The commercial elements surrounding the Defendants' unauthorized display of the Work on CIO's Website, and the commercial elements of the Website in general, are such that material impairment of the Work's market is presumed. In *Sony Corp.*, the Supreme Court explained that "[i]f the intended *use* is for commercial gain, that likelihood [of market harm] may be presumed." *Sony Corp.*, 464 U.S. at 451. As discussed earlier, Defendants' infringement achieved a commercial advantage by offering the Work free of charge to those visiting the Website in the hopes of attracting support for CIO's cause and which could additionally result in the organization receiving donations or deriving the benefit of new membership fees from

Website visitors. *Cf. Worldwide Church*, 227 F.3d at 1118. In view of the commercial nature of Defendants' wholesale misappropriation of the Work, the Court is compelled, at a minimum, to presume impairment of the Work's market and conclude that the fourth factor weighs against a finding of fair use absent the admission of sufficient, credible evidence required to rebut such a presumption. *See Sony Corp.*, 464 U.S. at 451.

Even without affording Righthaven the presumption of market harm to which it is entitled given the commercial nature of Defendants' unauthorized 100% copying of the Work, the record in this case in view of the applicable case law definitively tips the fourth factor against a fair use finding. First, as opposed to a transformative work, "a work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original." *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 607 (9th Cir. 2000). The law is clear that "a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling the demand for the original." *Campbell*, 510 U.S. at 587-88. In the *Campbell* decision, the Supreme Court explained that whether a work is copied verbatim is a relevant inquiry under the fourth fair use factor, as this may reveal "a greater likelihood of market harm . . ." *Id.* at 587. "[W]here the [defendant's] use is for the same intrinsic purpose as the copyright holder's . . . *such use seriously weakens a claimed fair use.*" *Worldwide Church*, 227 F.3d at 1117 (emphasis added) (*quoting Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989)).

Here, the Defendants cannot escape the fact that they engaged in the cyberspace equivalent of making a Xerox copy of the Work and then used the Xerox copy to advance their own organizational purpose. Defendants did nothing to alter the content of the Work or to use the Work in connection with critical discussion or examination. (Compl. Ex. 2, Doc. #1-1 at 6-7.) Stated differently, Defendants' unauthorized republication of the Work was entirely lacking in even a scintilla of transformational content or qualities. Such circumstances warrant the conclusion that Defendants' infringing conduct has likely caused a substantial impairment on the potential market for the Work and that Defendants' infringing copy of the Work fulfilled the demand for the original. *See Campbell*, 510 U.S. at 587-88; *Sony Computer Entm't, Inc.*, 203 F.3d at 607.

Additionally, the Court's analysis of the fourth fair use factor must consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original." *See Campbell*, 510 U.S. at 590 (internal quotation marks omitted). In this regard, the appropriate inquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Id. (quoting Harper & Row Publishing, Inc.*, 471 U.S. at 568).[1] Such reasoning, when applied to the instant case, clearly reflects the presence of potential market harm.

If numerous, additional Internet users were to replicate the Defendants' wholesale, cyberspace Xerox copy of the Work, the market for both the Work and derivatives of the Work would be inevitably diminished regardless of the intentions of each individual infringer. The Ninth Circuit has held that the fourth fair use factor is not limited to market impairment; this analysis also includes "the effect of the use on the *value* of the copyrighted work." *Worldwide Church of God*, 227 F.3d at 1119 *(quoting* 17 U.S.C. § 107(4)) (emphasis in original). Thus, "even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have . . . [t]hose rewards need not be limited to monetary rewards; compensation may take a variety of forms." *Id. (quoting Sony Corp.*, 464 U.S. at 450).

The potential reduction of a literary work's present and future market value resulting from Internet-based copyright infringement is exemplified by the district court's holding in *Free Republic II*. In *Free Republic II*, the defendants asserted a fair use defense to justify the posting of the plaintiff's newspaper articles on the defendants' website. *Free Republic II*, 54 U.S.P.Q.2d at 1455-59. In finding against fair use, the United States District Court for the Central District of California explained that "[d]efendants use 'substitutes' for the originals, and has the potential of lessening the frequency with which individuals visit plaintiffs' websites, of diminishing the market for the sale of archived articles, and decreasing the interest in licensing the articles." *Id.* at 1471.

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[1] Similarly, in this analysis, "[a]ctual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage." *Sony Corp.*, 464 U.S. at 451.

The reasoning employed by the court in *Free Republic II* should be applied by this Court. As the Defendants' infringing conduct arguably substitutes for and supersedes the purpose of the original Work given that it consists of a 100% replication of the Work, it takes very little, if any, leap in deductive reasoning to conclude that readers of the Work on the CIO's Website may be diverted from, or elect not to read, the Work's original source publication. Stated differently, there is simply no intuitive motivation for someone reading the wholesale, 100% replication of the Work on CIO's Website to seek out and read the original version of the Work in any format – such as an Internet website copy or a hard copy. Simply put, the reader has digested the content and is in all likelihood through with the Work, thereby depriving the source publication of other tangible and intangible benefits of increased readership, viewership and/or subscribership. These virtually required logical inferences in view of Defendants' infringing conduct clearly support a finding of diminished value of the Work and of derivatively associated literary works available from the source publication. Such a finding weighs against fair use under factor four of the Court's analysis.

While not yet a recognized consideration under the fourth fair use analysis factor, the Court should at least appreciate the societal and economic benefits of protecting literary works emanating from newspapers in light of the aggregate effect of Internet-based copyright infringements. It is no secret that newspapers across the country are in distress due to declining readership numbers. For instance, in 2009, the *Washington Post* reported that newspaper circulation in the United States was at its lowest level in 70 years.[2] There is even a website entitled: "newspaperdeathwatch.com" – a site dedicated to "chronicling the decline of newspapers."[3] The decline of newspapers nationwide has coincided with the rise of the Internet, and has thus concomitantly coincided with the rise of Internet-based copyright infringements reflected by Defendants' conduct. Furthermore, it is irrelevant that an online infringement of a

[2] http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html

[3] http://newspaperdeathwatch.com/

newspaper's copyright-protected material is not always attributable to directly competing news outlets. As a recent study by the Pew Internet and American Life Project found that "[t]hree-quarters of people who consume news online said they do so thanks to e-mails or posts on social media sites."[4] Thus, whether the Internet-based copyright infringement of an article published by the Las Vegas *Review-Journal* is committed by the *Las Vegas Sun*, by the *New York Times*, or by the Defendants' Website, the unauthorized public display of that copyright-protected material still has the detrimental effect of diverting valuable Internet traffic away from the original source publication. As such, in addition to substantiating Righthaven's argument that infringing acts such as those committed by Defendants diminish the value of the Work and derivations thereof, the above circumstances also demonstrate the economic and societal benefits inherent in enforcing the rights of copyright holders in cases of Internet-based infringement. Righthaven asserts the Court should conclude that factor four weighs against finding of fair use based on the record before it. Such a finding would additionally further the societal and economic goals of enforcing the rights of copyright holders in the face of Internet-based infringement.

C. Righthaven's Procedural Concerns About Potential Dismissal by OSC

As argued above, Righthaven steadfastly maintains that it is entitled to a finding, as a matter of law, that Defendants are not entitled to claim fair use as a defense to their infringing conduct. This result, according to Righthaven's view of the record before the Court, is authorized by Rule 12(b)(6) or Rule 56 in view of controlling precedent such as *Worldwide Church*. The same result is not true should the Court be inclined to dismiss Righthaven's infringement claims on fair use grounds.

In the event the Court is inclined to grant *sua sponte* dismissal pursuant to Rule 12(b)(6), it is reminded that such action is only "appropriate when it is clear that no relief could be granted under any set of fact that could be proven consistent with the allegations set forth in the complaint." *See Burnett*, 491 F.Supp.2d at 966. Moreover, under a Rule 12(b)(6) analysis, the Court must construe all allegations asserted in the complaint in Righthaven's favor and all

[4] http://arstechnica.com/gadgets/news/2010/02/internet-overtakes-print-in-news-consumption-among-americans.ars

material allegations - including any reasonable inferences drawn from same - must be accepted as true. *See id.* Where dismissal is granted, leave to amend should be granted unless doing so is futile. *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d at 991. Given these standards, Righthaven maintains that dismissal of its infringement claims would be wholly inappropriate. That said, even if the Court were to grant dismissal, Righthaven respectfully requests leave to amend to address any potential deficiencies in its allegations against Defendants.

In the event the Court is inclined to dismiss the copyright infringement claims before it *sua sponte* pursuant to Rule 56, the Court is reminded that the party facing dismissal must have been provided with a sufficient opportunity to appreciate the discovery topics at-issue and to conduct discovery on such topics. *See Portsmouth Square, Inc.*, 770 F.2d at 869. In this case, Righthaven has not conducted even a shred of discovery. While Righthaven maintains that discovery is largely unnecessary to adjudicate a finding against fair use given the record presented, an analysis by the Court to the contrary may involve topics such as the commercial nature of Defendants' infringing use of the Work that Righthaven has not had an opportunity to fully appreciate or explore through the discovery process. As such, in the unlikely event the Court is inclined to dismiss the infringement claims before it on fair use grounds, Righthaven respectfully requests an opportunity to conduct discovery pursuant to Federal Rule of Civil Procedure 56(f) on, at least, the topics set forth in the supporting Declaration of Shawn A. Mangano, Esq. for such request.

V. CONCLUSION

Righthaven asserts that the Court's fair use analysis should be guided by the Ninth Circuit's decision in *Worldwide Church*, as well as in view of the additional case law cited above. When this analysis is properly conducted, Righthaven maintains that not only should its claims survive the OSC, but the Court should find, as a matter of law, that Defendants are not entitled to a fair use defense.

In the alternative, if the Court is inclined to dismiss the infringement claims before it pursuant to Rule 12(b)(6), Righthaven asks for leave to amend to correct any perceived deficiencies in its allegations against Defendants. To the extent the Court is inclined to dismiss the infringement claims before it pursuant to Rule 56, Righthaven respectfully requests an opportunity to conduct discovery pursuant to Federal Rule of Civil Procedure 56(f) on, at least, the topics set forth in the Declaration of Shawn A. Mangano, Esq.

Righthaven additionally requests the Court enter such relief as it deems just and appropriate in view of the record before it in this action.

Dated this 29th day of November, 2010.

SHAWN A. MANGANO, LTD.

By: /s/ Shawn A. Mangano
SHAWN A. MANGANO, ESQ.
Nevada Bar No. 6730
shawn@manganolaw.com
9960 West Cheyenne Avenue, Suite 170
Las Vegas, Nevada 89129-7701
Tel: (702) 683-4788
Fax: (702) 922-3851

J. CHARLES COONS, ESQ.
Nevada Bar No. 10553
ccoons@righthaven.com
Assistant General Counsel at Righthaven LLC
JOSEPH C. CHU, ESQ.
Nevada Bar No. 11082
jchu@righthaven.com
Staff Attorney at Righthaven LLC
Righthaven LLC
9960 West Cheyenne Avenue, Suite 210
Las Vegas, Nevada 89129-7701
(702) 527-5900

Attorneys for Plaintiff Righthaven LLC

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am an employee of Righthaven LLC and that on this 29th day of November, 2010, I caused the **PLAINTIFF'S REPONSE TO ORDER TO SHOW CAUSE AND, ALTERNATIVELY, REQUEST FOR A CONTINUANCE TO CONDUCT DISCOVERY PURSUANT TO FRCP 56(f)** to be served by the Court's CM/ECF system.

SHAWN A. MANGANO, LTD.

By: /s/ Shawn A. Mangano

SHAWN A. MANGANO, ESQ.
Nevada Bar No. 6730
shawn@manganolaw.com
9960 West Cheyenne Avenue, Suite 170
Las Vegas, Nevada 89129-7701
Tel: (702) 683-4788
Fax: (702) 922-3851

J. CHARLES COONS, ESQ.
Nevada Bar No. 10553
ccoons@righthaven.com
Assistant General Counsel at Righthaven LLC
JOSEPH C. CHU, ESQ.
Nevada Bar No. 11082
jchu@righthaven.com
Staff Attorney at Righthaven LLC
Righthaven LLC
9960 West Cheyenne Avenue, Suite 210
Las Vegas, Nevada 89129-7701
(702) 527-5900

Attorneys for Plaintiff Righthaven LLC